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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 U.S. SECURITIES AND EXCHANGE
4 COMMISSION,

Petitioner,

5 v.

21 MC 810 (JPO)

6 TERRAFORM LABS PTE, LTD.,
7 DO KWON,

8 Respondents.

Remote Teleconference

9 -----x

10 New York, N.Y.
11 December 3, 2021
12 2:10 p.m.

13 Before:

14 HON. J. PAUL OETKEN,

15 District Judge

16 APPEARANCES

17 U.S. SECURITIES AND EXCHANGE COMMISSION

18 Attorneys for Petitioner

19 BY: JAMES P. CONNOR

20 DENTONS US LLP

21 Attorneys for Respondents

22 BY: DOUGLAS W. HENKIN
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(Remote teleconference)

THE COURT: Good afternoon, everyone.

This is Judge Oetken.

Mr. Hampton will call the case.

(Case called)

THE DEPUTY CLERK: Starting with the government, SEC, counsel, please state your name for the record.

MR. CONNOR: Yes. This is James Connor for the Securities and Exchange Commission. Good afternoon.

THE COURT: Good afternoon.

THE DEPUTY CLERK: And for respondent?

MR. HENKIN: This is Douglas Henkin with Dentons U.S. LLP for Terraform Labs and Mr. Kwon.

Good afternoon, your Honor.

THE COURT: Good afternoon.

Again, this is Judge Oetken.

I believe we do have a court reporter on the line, so please state your names before you speak.

I scheduled this call in the miscellaneous matter number 21 MC 810, which was filed on November 12th. And I accepted that miscellaneous case as related to an earlier civil action filed on October 22nd, numbered 21 CV 8701. And we're really, I think, just addressing the procedural issues raised in the parties' letters on the docket in the miscellaneous case that had been filed at docket numbers 10, 11, 12, 13. And I

LC3VSECC

1 don't think I need to decide whether there's any formal need to
2 consolidate or anything relating to that; it's obviously
3 related.

4 My initial view, just as a procedural matter, is that
5 I don't know that it matters which case proceeds. It seems to
6 me that the civil action is fundamentally a challenge to the
7 subpoena that was physically served or purported to be served
8 on Mr. Kwon, both in his individual capacity and as CEO of
9 Terraform Labs.

10 It seems to me that it probably makes sense to have
11 this resolved as the SEC suggests in the context of the
12 petition to enforce the administrative subpoena. And I believe
13 any argument as to service or arbitrary and capricious issues
14 as alleged in the civil action can be raised in the context of
15 its objection to the enforcement of subpoena or motion to quash
16 the subpoena. That's my initial view.

17 It seems to me the only thing we really need to decide
18 is setting a date for the respondents to file a response to the
19 brief that the SEC has filed. But before I resolve that, I
20 want to give you a chance to address anything I might have
21 missed in that regard.

22 I'll start with Mr. Connor for the SEC.

23 MR. CONNOR: Yes, your Honor, and thank you.

24 We think that's exactly right. We think that the
25 validity of the SEC subpoena should be addressed in the context

LC3VSECC

1 of the subpoena enforcement action. We noted in our letters
2 that the subpoena enforcement action, and not the civil action,
3 is the widely recognized and exclusive procedure for resolving
4 the validity of SEC subpoenas. We pointed to the *Sprecher v.*
5 *Graber* case from the Second Circuit, 716 F.2d 968.

6 The only other point I'll make, your Honor, is that
7 respondents will have every opportunity, as your Honor
8 mentioned, to raise all the challenges that they raised in the
9 civil action. One of the factors that the Court looks at in
10 deciding to enforce the subpoenas is whether the administrative
11 steps required have been followed. So that is one of the
12 factors that courts consider in deciding whether to enforce the
13 subpoenas.

14 So we think they'll be given every opportunity to
15 raise any challenge they have there. And we also think that in
16 addition to being the proper vehicle under case law, there are
17 also distinct advantages to the subpoena enforcement action, in
18 that they are typically resolved much quicker than civil
19 actions. Courts in this district typically resolve SEC
20 applications to enforce subpoenas within approximately 30 days.
21 And for precedent there, I could point the Court to *SEC v.*
22 *Fauth*, which is a recently decided case; and also *SEC v.*
23 *Carter*, which was before Judge Gardephe. And *SEC v. Fauth* was
24 before Judge Carter.

25 THE COURT: How do you spell that?

LC3VSECC

1 MR. CONNOR: It's F-A-U-T-H. And that was an action
2 that was filed on October 20th, 2021, and it was recently
3 resolved on November 12th, 2021.

4 THE COURT: Okay. Mr. Henkin?

5 MR. HENKIN: Thank you, your Honor.

6 As you can imagine, we disagree with what Mr. Connor
7 just asserted. And I think the difference here fundamentally
8 is that in all of the cases that the SEC has relied on, there
9 was -- these were fundamentally cases that were challenging the
10 subpoenas. For example, *Fauth* was opposing the subpoena on the
11 grounds of undue burden due to the target's poor health; *Carter*
12 was opposing the subpoena on the grounds of undue burden
13 because the SEC sought testimony for an unlimited number of
14 days rather than several hours.

15 There are other cases that are quite different. The
16 *Sprecher* case, for example, was a plaintiff bringing an action
17 to quash an administrative subpoena on the grounds that it
18 constituted harassment. And *Sprecher* didn't hold that
19 sovereign immunity bars actions against the SEC under the APA
20 for violating its own rules.

21 In contrast, the main issue here and the reason that
22 we have suggested the methodology that we did, is that there is
23 a core issue here about whether the SEC complied in the first
24 instance with Rule 150(b). And that's an issue that can be
25 addressed without any discovery and very quickly with regard to

LC3VSECC

1 briefing. Because if the SEC didn't comply with Rule 150(b),
2 then the subpoenas that were issued here, which were actually
3 issued to Mr. Kwon in his individual capacity and purportedly
4 to Terraform Labs via Mr. Kwon, just were not lawful in the
5 first instance. And so that would make both cases go away.

6 Our suggestion was to address the 150(b) issue on its
7 own; because if we have to respond to the SEC's entire brief,
8 then, as opposed to addressing Rule 150(b) compliance first,
9 then we need to get into questions regarding whether the
10 subpoena seeks new information relevant to an investigation
11 with a proper purpose, whether it's unreasonable or was issued
12 in bad faith and whether compliance is unnecessarily
13 burdensome. It also requires us to get into questions of
14 personal jurisdiction; whereas if we go directly to the 150(b)
15 issue and deal with it quickly, which I think we can, we made a
16 suggestion as to a schedule, but I'm more than willing to
17 discuss a different schedule. That may resolve everything very
18 quickly.

19 THE COURT: Let me try to understand.

20 When you say the 150(b) issue, it's the issue that the
21 SEC knew that these respondents had counsel and nevertheless
22 served Mr. Kwon or purported to serve Mr. Kwon when he was in
23 New York for this conference. Is that the issue you're talking
24 about?

25 MR. HENKIN: That's the issue.

LC3VSECC

1 And the key part of it that really makes this, I
2 think, relatively quick to deal with is that under those
3 circumstances, the commission is required to get an order
4 permitting it to do what it did. And we know from the record
5 that the SEC did not get that order here.

6 THE COURT: But at the time -- I think the rule says
7 that you have to -- that that rule applies if the lawyer has
8 filed a notice of appearance. But you hadn't filed a notice of
9 appearance at that point, had you?

10 MR. HENKIN: Well, actually, that's not the SEC's
11 view. The SEC has itself in litigation taken the position that
12 the notice that it had from us here sufficed under Rule 150(b).
13 And it actually took that position in a case called *SEC v.*
14 *Deloitte Touche Tohmatsu*, which was a District of D.C. case in
15 2013. So the SEC actually agrees with us that we had given
16 them enough notice to bring 150(b) into effect and require the
17 order.

18 THE COURT: Okay. But if that applied, wouldn't it be
19 the case that they just had to serve your clients through
20 counsel, which they did within a day or two?

21 MR. HENKIN: No. Actually what's interesting, if you
22 look at the record, your Honor, is that they -- the SEC
23 contends that the service was completed on Mr. Kwon and they
24 sent counsel courtesy copies. They didn't ask to serve through
25 counsel.

LC3VSECC

1 Obviously, as your Honor knows, service through
2 counsel -- counsel are not required to accept service. So the
3 real question comes down to was the service on Mr. Kwon valid
4 in the first instance. And if they didn't have an order that
5 allowed them to do that, then that service was not valid. The
6 subpoenas were not valid.

7 THE COURT: You're saying under this rule that they
8 had to get a vote of the actual Securities and Exchange
9 Commission to serve Mr. Kwon?

10 MR. HENKIN: They had to get an order from the
11 commission, that's right. That's what the rule says.

12 THE COURT: How does that square with the other SEC
13 rule cited in the SEC's brief that very straightforwardly says
14 that an administrative subpoena can be served by physical
15 service on the recipient of the subpoena?

16 MR. HENKIN: The way you go through it, your Honor, is
17 you start with Rule 203.8, which says, Service of subpoenas
18 issued in formal investigative proceedings shall be effected in
19 the manner prescribed by Rule 232(c). Then you go to Rule
20 232(c), which says, The provisions of this paragraph shall
21 apply to the issuance of subpoenas for the purposes of
22 investigations; and says that service shall be made pursuant to
23 the provisions of Rule 150(b) through (d). And then Rule
24 150(b) says, Upon a person represented by counsel whenever
25 service is required to be made upon a person represented by

LC3VSECC

1 counsel who's filed a notice of appearance, service shall be
2 made pursuant to paragraph C upon counsel, unless service upon
3 the person represented is ordered by the commission or the
4 hearing officer. That's the key part.

5 And when you go through it in that -- when you go
6 through the rules in that order and it becomes clear, as it is
7 here, that the commission didn't have the "ordered by the
8 commission" part, the service is invalid.

9 THE COURT: All right.

10 Mr. Connor, would you like to respond briefly?

11 MR. CONNOR: Yes, I would.

12 Your Honor, we believe that Section 150(d), which
13 specifically says that service of an investigative subpoena may
14 be made by delivering a copy of the filing, and then defines
15 "delivery" as personal service, handing a copy to the person or
16 party to be served, that that resolves the question.

17 Even if that didn't resolve the question, which,
18 again, we think it does, if you look at Section 150(b), it
19 states, Whenever service is required to be made upon a person
20 represented by counsel who has filed a notice of appearance --
21 respondents' counsel did not file a notice of appearance in
22 this case. Even had they filed a notice of appearance though,
23 the key point is that it says, If they had filed a notice of
24 appearance, service shall be made pursuant to paragraph C of
25 this section. Paragraph C of that section specifically allows

LC3VSECC

1 for electronic service. And the SEC sent a copy of the
2 subpoenas the same day on which they were served electronically
3 to respondents' counsel. So any way you look at it, whether
4 you look at it under 150(b) or 150(d), service here was
5 unquestionably proper.

6 THE COURT: But Mr. Henkin points out that the
7 courtesy copy sent to counsel could not constitute service in
8 the technical sense because it was just a courtesy copy, and
9 they wouldn't have accepted it if it were Service.

10 MR. CONNOR: Your Honor, whether or not they accepted
11 it or not, the rule provides that whenever -- and again, we're
12 in the world in which respondents' counsel had filed a notice
13 of appearance, which they didn't do. But had they done it,
14 then the SEC would have been entitled to effect service
15 electronically. And so whether or not respondents' counsel
16 accepted it or not, the service is effective when it's sent,
17 when it's delivered electronically. So whether the SEC
18 entitled it a courtesy copy or said it was service, the reality
19 is that the email was sent, it was electronically delivered,
20 and that would have been proper service had respondents'
21 counsel filed a notice of appearance.

22 We don't agree with respondents, heads I win, tails,
23 you lose, attempt to look at these rules. The reality is
24 Mr. Kwon was personally served with the subpoena. His counsel
25 was served with -- I shouldn't say "served," was sent the

LC3VSECC

1 subpoena electronically. There's just no question that under
2 any way you look at it, that both his counsel and himself have
3 received the subpoenas and they should be enforced.

4 And again, your Honor, I think, sort of, this colloquy
5 that we're having about whether the administrative steps have
6 been followed, that's exactly what we think is the purpose of
7 the application to enforce the subpoena. Again, under *United*
8 *States v. Powell*, which is the Supreme Court case that lays out
9 the factors that courts look at in deciding whether and to
10 enforce the subpoena, the last factor is whether the
11 administrative steps have been followed.

12 Respondents' counsel apparently believe the
13 administrative steps have not been followed. But they should
14 be given an opportunity to respond to our application; we will
15 file a reply; and then the Court can resolve the issue. But
16 this is the context in which this issue should be resolved. It
17 certainly should not be resolved in a collateral civil action,
18 because it's just not proper under Second Circuit precedent.

19 THE COURT: I agree with that.

20 This will be resolved through the miscellaneous case,
21 because it's -- I'm not hearing anything that would prevent any
22 issue that respondents wanted raised in the context of the
23 subpoena enforcement proceeding. Sounds like Mr. Henkin would
24 like an opportunity to raise this narrow issue first. And I
25 could do that in the subpoena enforcement matter, the rule --

LC3VSECC

1 the SEC rule issue, but I'm not inclined to do that because,
2 you know, you've had this thing for several weeks; I don't know
3 why you can't respond to the government's brief -- sorry, the
4 SEC's brief that was filed on November 12th.

5 So I'll give you two weeks from today to file your
6 response to the brief; and then two weeks for any reply.

7 MR. CONNOR: Your Honor, I think we would only need a
8 week for a reply.

9 THE COURT: Was that Mr. Connor?

10 MR. CONNOR: Yes. I'm sorry, your Honor. Yes.

11 THE COURT: Okay. You could file your reply within a
12 week. And then I'll either get you on the phone for oral
13 argument or decide it on the papers.

14 Anything else for today from Mr. Connor?

15 MR. CONNOR: No. Thank you, your Honor.

16 THE COURT: Anything else for Mr. Henkin?

17 MR. HENKIN: Your Honor, I will say that we will be
18 requesting oral argument, because I think that there are issues
19 that are raised here that will benefit from the Court hearing
20 argument beyond what's in the papers.

21 THE COURT: Okay. That's fine.

22 You could just note that in your filing.

23 MR. HENKIN: Okay. Thank you, your Honor.

24 THE COURT: All right. Thanks, everyone.

25 Have a good weekend. We're adjourned. (Adjourned)